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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOLDEN PACIFIC BANCORP and
MILES P. JENNINGS, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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LEONARD A. LEO
Counsel of Record for Petitioners
4001 North 9th Street
Suite 707
Arlington, Virginia 22203
(703) 528-2180

JONATHAN R. MACEY
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3469
Of Counsel

QUESTIONS PRESENTED

I. Whether the mere existence of a comprehensive regulatory scheme is itself sufficient to foreclose takings claims brought against the United States under the Fifth Amendment to the United States Constitution.

II. Whether *per se* takings analysis applies in cases where the federal government takes all the intangible property interests of a firm's shareholders for itself.

PARTIES TO THE PROCEEDING

The petitioners are Golden Pacific Bancorp and Miles P. Jennings, Jr. There are no parent or subsidiary companies. The respondent is the United States of America.

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Petitioners Golden Pacific Bancorp and Miles P. Jennings, Jr. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this action on February 8, 1994.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 15 F.3d 1066, and is reprinted in the appendix hereto at pages A-1 through A-16.

The order of the United States Court of Federal Claims (Tidwell, J.) is reprinted in the appendix hereto at pages A-23 through A-28.

JURISDICTION

The judgment of the Federal Circuit was entered on February 8, 1994. A petition for rehearing, with suggestion for rehearing *in banc*, was first denied on March 18, 1994, but by an order dated March 23, 1994, that denial was rescinded and the court called for a response from the government. The petition finally was denied on April 19, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1992).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and 12 U.S.C. § 191, a provision of the National Banking Act, are reprinted in the appendix hereto at page A-29.

STATEMENT

The Facts

Golden Pacific National Bank ("Bank") was a national bank, chartered to conduct the business of a national bank pursuant to 12 U.S.C. § 27 (1988), and subject to the regulatory authority of the Comptroller of the Currency, a federal agency of the United States. Golden Pacific Bancorp ("Bancorp") is a bank holding company and owns approximately 90 percent of the shares of stock in the Bank. Miles P. Jennings, Jr. is a United States citizen who owns 6,400 shares of stock in Bancorp. Bancorp — which is incorporated in Delaware and whose principal place of business is New York — is authorized to own shares of stock in the Bank pursuant to 12 U.S.C. § 1842 (1988).

The Comptroller initiated a surprise investigation of the Bank on June 17, 1985. The investigation was triggered by an investment program that the Bank had established in 1979 and that

had operated continuously since then without investor loss or complaint. The program involved the sale by the Bank of non-negotiable, off-balance sheet certificates that made investment opportunities available through custodial accounts administered by the Bank. The certificates offered by the program stated a fixed rate and maturity date and consistently were honored upon demand or maturity.

The investment program worked in the following way: private individuals or businesses tendered money to the Bank, and in return, received a certificate of deposit. The money was placed in custodial accounts. The Bank in turn invested the individuals' money by making loans or other investments and by purchasing federal funds. These loans, investments and federal funds, if included on a balance sheet, would be assets of the Bank; the principal and interest due to individuals holding certificates from the program would be liabilities of the Bank. The certificates and investments were treated as an off-balance sheet program so that a higher rate of interest could be offered to participating customers.

Bank management did not consider the certificates to be general obligations of the Bank. Instead, these investment instruments, like money market funds, were treated as separate investment accounts. Bank management invested the funds on behalf of investors and linked investors' returns to the cash flows on the assets in which the management had invested the money. Consistent with this understanding, the Bank did not consider these investment instruments to be either moral obligations or legal liabilities of the Bank. Consequently, they were not listed on the Bank's balance sheet as liabilities or as part of the Bank's quarterly reports of condition to the Comptroller of the Currency. The Comptroller, though, was on notice of the program; and many banks, including Citibank, offer similar programs involving the sale of their parent company debt obligations to depositors.

During its surprise investigation of June 17-21, 1985, the Comptroller decided that the certificates of the investment

program — named "Yellow CDs" by the government — should be counted as deposits of the Bank and therefore designated as liabilities on the Bank's balance sheet. Though the Bank presented the Comptroller's examiners with evidence of non-booked assets to correspond with the non-booked liabilities of the Yellow CD program, the Comptroller was not satisfied that these assets were sufficiently documented to warrant offsetting the liabilities. The Comptroller therefore declared the Bank insolvent on June 21 and appointed the FDIC as receiver under 12 U.S.C. § 191 (1988), which read: ". . . whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs . . . appoint a receiver, who shall proceed to close up such association."

At all times before June 21, 1985, the government treated the Bank as a solvent financial institution — that is, its assets exceeded liabilities. The records of the Comptroller and the FDIC say as much. The Bank had over $9,000,000 in regulatory capital on gross assets of between $163,800,000 and $166,009,000. This means that in June 1985, the Bank had, by the government's very own determination, a very respectable level of capitalization of 5.5 percent. This level of capital placed the Bank in the top quartile of all United States banks in terms of capitalization. Moreover, the Bank had an extraordinary percentage of its assets in highly liquid form — namely, cash or marketable securities. The Bank's balance sheets showed $55,306,000 in highly liquid assets, which is an exceptionally high proportion of its loan portfolio of $100,253,000.

By treating the Yellow CDs as liabilities, and by not offsetting those liabilities with any related assets, the Comptroller significantly recast the book value of the Bank. While regulators previously treated the Bank as having over $9,000,000 in regulatory capital, the Comptroller created what he viewed as a shortfall of $6,634,931 by adding $15,000,000 in liabilities to the balance sheet. The shortfall is what prompted the Comptroller to conclude that the Bank could not meet its obligations and therefore had to be closed.

Ultimately, all depositors and creditors were paid in full upon liquidation and the government was compensated for $14,000,000 in liquidation expenses. There was still over $12,000,000 in excess assets to spare, which the government claims for itself and refuses to turn over to Bank shareholders. Bancorp and the other shareholders did not receive any of the excess or residual assets of the Bank and therefore were not compensated for the loss of their shares of stock that occurred as a result of the Bank being closed by the Comptroller.

Proceedings Below

On June 21, 1991, Bancorp filed an action in the United States Court of Federal Claims, invoking the court's Tucker Act jurisdiction, 28 U.S.C. § 1491 (1988). (A-23). In pertinent part, Bancorp argued that the Comptroller's action constituted a compensable taking under the Fifth Amendment to the United States Constitution. The gravamen of Bancorp's claim was that the government closed a solvent bank without compensating the shareholders, and in so doing, took for itself the valuable property interests represented by the Bank shareholders' stock. Those interests included the equity value of the shares, which takes into account the right to excess and residual assets of the Bank during its operation and upon dissolution.

It bears noting that Bancorp did not argue that the Comptroller lacked authority to close the Bank. We fully recognize that the operative statute in 1985 — 12 U.S.C. § 191 — empowered the Comptroller to close a bank when he reasonably believed, upon due examination of its affairs, that it was insolvent. Bancorp argued instead that if the Comptroller closed a bank that he believed was insolvent, and it was later discovered that the bank was solvent, then the Fifth Amendment demands that the bank shareholders be compensated for the loss of their property interest, which at a minimum would be the value of the bank's residual assets.

The government moved for summary judgment and the Claims Court granted the motion. The Claims Court reasoned

that Bancorp lacked the "right to exclude others" (i.e., the government) from its property interest and therefore did not have the historically rooted expectation of compensation required by the Fifth Amendment. (A-26). The Claims Court also stated that the Comptroller's action did not interfere with any reasonable investment-backed expectations "given the highly regulated nature of the banking industry." (A-27). The court therefore did not reach the question whether the Bank was in fact solvent when closed.

Bancorp appealed to the United States Court of Appeals for the Federal Circuit. In relevant part, Bancorp made two arguments for reversal of the Claims Court's order granting summary judgment to the government. First, at the time of the Comptroller's action in 1985, bank shareholders had a reasonable expectation that solvent financial institutions would not be closed, and there was a genuine dispute of fact as to whether the Bank in this case was insolvent. Bancorp maintained that this reasonable expectation was supported by the language of 12 U.S.C. § 191, which authorized the Comptroller only to close banks believed to be solvent. Bancorp's second argument was that the Comptroller's action should be treated as a *per se* taking because, in closing the Bank, the government had taken for itself *all* the property interests represented by the Bank's shares of stock and held by Bancorp and the other stockholders.

A panel of the Federal Circuit rejected both arguments in affirming the Claims Court. *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994) (A-1). The fact that the Bank operated in a highly regulated environment played a pivotal role in the panel's decision. The opinion states: "Given the highly regulated nature of the banking industry . . . the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation" on the part of Bancorp. *Id.* at 1074 (A-12). The opinion further reasons:

> Golden Pacific did not possess either the historically rooted expectation of compensation or the reasonable investment-backed expectation necessary to support

> a Fifth Amendment taking because it chose to invest in an entity – the Bank – which did not possess the right to exclude others. And the reason the Bank did not have the right to exclude others – most notably the Comptroller – was that the Bank was a member of a highly regulated industry.

Id. at 1074-75 (A-13).

According to the panel, the lack of interference with reasonable investment-backed expectations – which is a consequence of both the complex regulatory scheme that governs banking and the Bank's inability to exclude the government – was itself sufficient to defeat Bancorp's taking claim. Speaking of its regulatory takings analysis, the panel explained:

> The type of case-by-case approach that is required is set forth in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984):
>
> > The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. [citation omitted]. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." [citation omitted].
>
> . . .
>
> . . . We need only focus upon the third of the three factors set forth above in *Monsanto*: interference with reasonable investment backed expectations. *Monsanto*

> teaches that "the force of this factor [may be] so overwhelming . . . that it disposes of the taking question . . . ." [citation omitted].

Id. at 1072, 1074 (A-9, 12). The panel therefore did not consider either: (1) the character of the government's action — a transfer of ownership of the bank's shares from Bancorp to itself; or (2) the economic impact of the government's action — a taking of the *full* value of Bancorp's property interest. Nor did the panel treat the government's action as a *per se* taking, in which case the government would have had to establish that background legal principles do not recognize any of the property rights asserted by Bancorp as the shareholder of a solvent firm.

Bancorp petitioned the panel for rehearing and suggested that the Federal Circuit rehear the case *in banc*. In pertinent part, Bancorp faulted the panel opinion for requiring an airtight rather than merely a reasonable expectation of no interference with its property interests by the government. Bancorp also maintained that the mere existence of a complex regulatory scheme should not foreclose a taking claim, particularly where government action completely extinguishes a shareholder's property interests. The panel denied the petition for rehearing and, after calling for a response from the government, the Federal Circuit declined to rehear the case *in banc*.

REASONS FOR GRANTING THE WRIT

I.

This Case Raises Important Federal Questions Because the Federal Circuit's Decision has the Effect of Foreclosing Takings Claims by Investors in Heavily Regulated Industries.

Throughout its opinion, the Federal Circuit makes much of the fact that Petitioners conducted business in a highly regulated industry. The Circuit panel's opinion states: "Given the highly

regulated nature of the banking industry . . . the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation on the part of Golden Pacific." 15 F.3d at 1074 (A-12). Later, the panel opinion declares: "Golden Pacific did not possess either the historically rooted expectation of compensation or the reasonable investment-backed expectation necessary to support a Fifth Amendment taking because it chose to invest in an entity – the Bank – which did not possess the right to exclude others. And the reason the Bank did not possess the right to exclude others – most notably the Comptroller – was that the Bank was a member of a highly regulated industry." *Id.* at 1074-75 (A-12).

The Fifth Amendment to the United States Constitution requires that the federal government pay just compensation when it takes private property for a public purpose. U.S. CONST., Amend. V (1791). Property most clearly has been taken when the government physically invades or occupies an individual's land. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). In a case where it is the long arm of regulation that reaches onto private property so as to restrict all economic use or to dash all reasonable investment-backed expectations, property is confiscated just as surely as if the government had physically invaded the land. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2892-95 (1992); *Monsanto*, 467 U.S. at 1011.

Never has the Supreme Court simply concluded that the highly regulated nature of an industry is a bar to establishing a taking claim. The just compensation mandate of the Fifth Amendment secures for the citizens of this nation one of the most fundamental civil rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). It is a safeguard against government overreaching and tyranny. *See Lucas*, 112 S.Ct. at 2894-95. Vigorous enforcement of the Takings Clause is essential, for "in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, para. 1790 (1833).

Indeed, there are particularly strong reasons for vigorous enforcement of the Takings Clause in the highly regulated banking environment. The government's dual role in bank insolvency as both receiver and creditor gives rise to a blatant conflict of interests. As receiver, the government must maximize the value of a firm for all its legitimate claimants. But as a creditor, the government is primarily concerned with the deposit insurance fund and therefore has an incentive to maximize the fund balance. There is a risk, therefore, that whenever a solvent bank is closed, the government impermissibly might be appropriating assets for its own use. *Cf.* Macey & Miller, *Bank Failure, Risk Monitoring, and the Market for Corporate Control*, 88 COLUM. L. REV. 1153, 1172-93 (1988). That is precisely the type of scenario that the Takings Clause is supposed to address. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1985) (discussion of situation where government has taken property rights "for its own use"); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

In a variety of settings, the Supreme Court has demonstrated concern about unregulated state power by making clear that a taking claim is not extinguished merely by dint of a pervasive regulatory scheme. Cognizable takings claims can exist, for example, in the face of a "comprehensive regulatory statute" such as FIFRA (*Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984)), the Clean Water Act (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)), the Natural Gas Act (*Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 391-92 (1974)), and the Surface Mining Control and Reclamation Act (*Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 297 n.40 (1981); *see also id.* at 305-07 (Powell, J., concurring)).

The Supreme Court's discussion of public utilities ratesetting in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), also makes clear that the highly regulated nature of an industry will not foreclose takings claims under the Fifth Amendment. The Court recognized that the "economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to

arbitrate these economic niceties." *Id.* at 314. In a similar vein, the Court noted that the Constitution "within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." *Id.* at 316. Nonetheless, the Court stated that cases in this area could have "constitutional overtones." *Id.* at 310. The Fifth Amendment just compensation mandate applies when the impact or effect of a particular ratesetting methodology is so unreasonable or unjust as to be confiscatory. *Id.* Such unreasonableness is a function of what rate of return investors reasonably can expect given "the rate methodology" or "the risks under a particular ratesetting system." *Id.* at 310, 314-15.

The relevant question, then, is not simply whether there is a comprehensive regulatory scheme, but what reasonable, investment-backed expectations a property owner maintained in such a setting. To be sure, the highly regulated nature of the banking industry limits the range of an investor's expectations. There can be no expectation, for example, that records can be held from the Comptroller, or that the Comptroller will refrain from entering a bank's premises to conduct investigations. Nor can there be any expectation that the Comptroller will refrain from closing an insolvent bank, even though, by use of the term "may," section 191 gave the Comptroller discretion. But for the Federal Circuit to have concluded that Golden Pacific absolutely "did not have the right to exclude" the Comptroller because it "was a member of a highly regulated industry" goes too far. Such reasoning completely ignores the parameters of the surrounding regulatory environment – here, the closure standard established by section 191 – which time and again the Supreme Court has deemed relevant in deciding whether a property owner has a cognizable claim under the Takings Clause. The Circuit panel reasoning also ignores the language of 12 U.S.C. § 1821 (1988), which stated explicitly that shareholders had a distinct interest in the residual assets of a bank.

The Federal Circuit's decision has the effect of foreclosing all takings claims involving the closure of solvent banks in the future. The statute under which Golden Pacific National Bank operated

was far less discretionary than the statutory scheme under which banks currently operate. While section 191 established a solvency standard for closure, the present statutory scheme authorizes closure whenever regulators decide that a financial institution is "unsafe" or "unsound." *See* 12 U.S.C. § 1821 (1992). If the solvency standard of section 191 did not create a reasonable expectation, the current statute certainly does not either.

The reasoning of the panel, if extended, also could have serious implications for shareholders who invest in a wide array of other heavily regulated industries. No business subject to the authority of a number of federal agencies – the EPA, OSHA, NLRB, FCC, FDA, and NRC, to name just a few – have the "right to exclude" as described by the Federal Circuit. Each of these agencies can enter a business's premises or examine its records. Some of these agencies can impose fines, prohibit the use of company property in certain ways, and, at times, constructively or formally assume control of company premises. The effect of the panel's opinion is to destroy the property interests of a large class of shareholders and thereby foreclose takings claims in vast areas of the nation's economic life.

All takings cases involving claims against the federal government for just compensation pass through the United States Court of Federal Claims, and, if appealed, through the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit's panel opinion establishes precedent in the only two courts where individuals and businesses may seek relief in the future for takings of their property by the federal government. The Circuit's error will have wide-ranging impact and therefore especially warrants this Court's attention.

II.

The Federal Circuit's Decision is in Direct and Readily Apparent Conflict with the Supreme Court's Opinion in *Ruckelshaus v. Monsanto.*

A. There has never been a precise mathematical formula for ascertaining when a "regulatory taking" has occurred. *See Penn*

Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1976). In 1922, Justice Holmes stated the bedrock principle of regulatory takings analysis – namely, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Justice Holmes, however, could not articulate a more definitive test, explaining that whether a taking has occurred is "a question of degree – and therefore cannot be disposed of by general propositions." *Id.*

Courts still must engage in an *ad hoc*, intensely factual inquiry to decide whether government regulation triggers the Fifth Amendment. But the contours of the analysis have been further defined since 1922. In the wake of *Penn Central*, three considerations often have guided this Court in deciding whether regulation is sufficiently confiscatory so as to effect a taking: the economic impact of the government action on the property owner, the extent to which the government action has frustrated the property owner's distinct and reasonable investment-backed expectations, and the character of the governmental action. *Lucas*, 112 S.Ct. at 2894 n.7, citing *Penn Central*, 438 U.S. at 124.

In some cases, the weight of the government's interest in regulation and the size of the loss and degree of intrusion faced by the property owner have been balanced. *See Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In other cases, reasonable investment-backed expectations have been frustrated so significantly by regulation that the Court had to look no further to reach the conclusion that a taking had occurred. That is what transpired in *Monsanto*, 467 U.S. at 1011.

Monsanto involved a taking claim arising out of application of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA is a "comprehensive regulatory statute" (467 U.S. at 991) requiring that pesticide manufacturers submit to the Environmental Protection Agency ("EPA") test data and information relative to formulas of products so that the agency

can monitor the accuracy of pesticide labelling. Before 1978, FIFRA protected from public disclosure material submitted by a manufacturer that constituted trade secrets or commercial or financial information. In 1978, Congress amended the law, providing for "disclosure of all health, safety and environmental data to qualified requesters. . . ." *Id.* at 995-96.

The Supreme Court held that EPA's public disclosure of material submitted by Monsanto Corporation between 1972 and 1978 would constitute a taking. Under FIFRA, Monsanto had reasonably come to expect that the valuable trade secret data it submitted to EPA from 1972 through 1978 would not be disseminated to the general public. This Court stated:

> [W]ith respect to trade secrets submitted [between 1972 and 1978], the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA . . . were now to disclose trade-secret data . . . EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

Id. at 1011.

Significantly for the purpose of this Petition, the Court in *Monsanto* required that there be only a "reasonable" — not an "airtight" — investment-backed expectation. The facts of the case bear this out: under the explicit terms of FIFRA, Monsanto only could be assured that EPA would not disclose data to the public if, "in its [EPA's] judgment," such data was deemed to contain trade secret information. *Id.* at 992. Thus, there was enough discretion in the hands of the EPA to disclose data that Monsanto, but not the agency, believed to contain trade secrets.

In contrast, the Federal Circuit's opinion makes abundantly clear that anything less than an airtight investment-backed

expectation would not be sufficient to trigger the Takings Clause in the case of Golden Pacific's claim. The statute under which the Comptroller of the Currency closed Golden Pacific National Bank in 1985 – 12 U.S.C. § 191 (1988) – provided that a bank may be closed and a receiver appointed only if the Comptroller "becomes satisfied of the insolvency of" the bank. In other words, at the time the Comptroller closed the bank, the touchstone for closure was insolvency. Bancorp reasonably could expect, therefore, that the equity value of its shares would not be extinguished by regulatory action unless the bank was insolvent.

That investors reasonably could expect the Comptroller not to close solvent banks in 1985 and thereby extinguish the equity value of their shares is confirmed by how the Congress altered the regulatory scheme with the passage in 1991 of the Federal Deposit Insurance Corporation Improvement Act, Pub. L. 102-242. Congress greatly expanded the grounds on which the Comptroller could close a bank. In addition to insolvency, 12 U.S.C. § 1821 (c)(5)(A) (1992), the Comptroller can now close a bank if: "the institution has engaged in substantial dissipation of assets" (12 U.S.C. § 1821 (c)(5)(B)); "the institution is in an unsafe or unsound condition" (12 U.S.C. § 1821 (c)(5)(C)); and "there is a violation of any law or regulation, or an unsound and unsafe practice that is likely to . . . weaken the institution's condition, or otherwise seriously prejudice the interests of the institution's depositors or the deposit insurance fund" (12 U.S.C. § 1821 (c)(5)(H)). Had this vague and highly discretionary scheme been in place in 1985 when the Comptroller closed the Bank, the question whether Bancorp had any expectations regarding the Comptroller's actions would be far more difficult. At the time, though, the far narrower and less ambiguous insolvency test of section 191 was in place.

The Federal Circuit opinion admits at one point that section 191 *does* give rise to an expectation of sorts:

> Golden Pacific's expectations could only have been that the FDIC would exert control over the Bank's

> assets if the Comptroller became satisfied that the Bank was insolvent and chose to place it in receivership.

15 F.3d at 1074 (A-12). For the lower court, this apparently was not a strong enough expectation that the Comptroller would refrain from closing solvent financial institutions. To be sure, a reasonable belief that a bank is insolvent, not insolvency-in-fact, was all that section 191 required for closure. Such a provision leaves open the possibility that a solvent bank might be closed. But absolute certainty on the part of the shareholders that their bank will avoid closure is not what *Monsanto* requires; Bancorp need only reasonably expect that this would be the case. Indeed, for the purpose of ascertaining whether there are reasonable expectations sufficient to trigger the Takings Clause, section 191 is certainly no less airtight than the "comprehensive regulatory statute" at issue in *Monsanto* (467 U.S. at 991), under which Monsanto's property interest ultimately hinged on whether the EPA decided to agree with the company that data submitted to the agency contained trade secret information. 467 U.S. at 992. The Federal Circuit, therefore, should not have held that the expectations afforded by Section 191 were sufficiently negligible so as to dispose of Bancorp's claim.

B. The Federal Circuit's decision falls prey to one of the central confusions surrounding current "reasonable expectations" analysis — how to deal with the circularity of having a property owner's expectations defined by government regulatory activity. The reasoning of the Federal Circuit panel was as follows: there is no reasonable expectation of noninterference because shareholders do not have a right to exclude the government from regulating the bank's affairs, and there is no right to exclude the government in view of the existence of a pervasive regulatory scheme.

In his concurring opinion in *Lucas*, Justice Kennedy addressed such reasoning: "There is an inherent tendency towards circularity . . . ; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental

authority, property tends to become what courts say it is." 112 S.Ct. at 2903. To be sure, "Some circularity must be tolerated." *Id.* But, at some point, circularity will lead to the elimination of all property rights. The enactment of a single regulation, for example, might reasonably create an expectation that further regulation will follow. Individual property owners arguably are therefore on notice about the possibility of future regulation and cannot complain when such governmental action occurs. Each round of government regulation provides justification for the next. In such a world, reasonable expectations analysis becomes a ratchet, serving only to diminish the protection accorded to private property.

Circular analysis with respect to a bank shareholder's reasonable investment-backed expectations — if taken to the extreme — leads to patently absurd results. If banking regulation dashes all reasonable expectations of noninterference with property rights, then every proxy and registration statement that has ever been filed with the Securities and Exchange Commission on behalf of a national bank violates federal securities law, for none of them warn investors that they can have absolutely no expectations about future ownership of their investments. And, had such disclaimers been included in securities offerings and other documents, the stability of the banking industry would have been compromised long ago for lack of any significant infusion of investment capital and entrepreneurial talent. In such a world, investors as well as depositors — who also can stand to lose at least some of their investment upon the closure of a financial institution — would just as soon leave their money under mattresses rather than with banks.

It also bears noting that excessive circularity in current reasonable expectations analysis is inconsistent with how the law treats property rights in the private, common law context. Assume, for example, that a landowner knows that his neighbor previously polluted surrounding air and water. The fact that the landowner reasonably can expect such conduct to continue hardly amounts to compensation-barring assumption of risk. *See, e.g., Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948);

RESTATEMENT (SECOND) OF THE LAW OF TORTS § 840D (1982). In a similar vein, predictions about impending regulatory activity by government hardly amount to an acceptance of the risk of any and all economic consequences.

III.

This Case Presents an Unsettled Question of Federal Law Regarding the Application of *Per Se* Takings Analysis to Government Action Involving the Total Expropriation of Property Interests other than Real Property.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), the Supreme Court reaffirmed that land use regulation which deprives one totally of his property interest is a *per se* taking. The Court stated: "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 2894-95. Under such circumstances, the government's action is to be treated as though it were a physical invasion of the land: "We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. [citation omitted]. 'For what is land but the profits thereof[?]' 1 E. COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812)." *Id.* at 2894.

Once a property owner establishes a *per se* taking of his property, the government has the burden of showing that the government's action did not impinge upon interests that inhere in the property owner's title to begin with. In the case of real property, for example, uses of land that pollute adjoining land do not inhere in a property owner's title:

> On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling

> operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plan, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id. at 2900. In the case of banking regulation, the relevant question might be a matter of how background legal principles define the rights of a debtor, for the government acts as a creditor and as receiver in this setting.

Lucas, though, leaves open the question whether this *per se* analytical framework applies in cases not involving land where the government takes for itself all the intangible property interests of a firm's shareholders. Dictum in *Lucas* raises the possibility that property interests relating to commercial dealings might be entitled to less protection than interests in real property. *Id.* at 2899-2900. But the Court offered no further details. Moreover, prior case law generally deals with situations where the government either has taken less than all of an individual's property interests in a firm (*Pennsylvania Coal*, 260 U.S. 393) or has not taken such interests for itself (*Connolly*, 475 U.S. 211).

The Federal Circuit's decision disregards the possibility that the *per se* analysis of *Lucas* might apply to the government's taking of all property interests of a solvent bank's shareholders. The decision limits *per se* analysis to physical invasions of real property – here, the bank's premises – and assumes that only the *ad hoc* considerations set forth in *Penn Central* apply to regulatory schemes not involving physical occupation, whether or not a total taking has occurred. 15 F.3d at 1074 (A-11, 12).

The Federal Circuit's decision not to treat a total taking of the shareholders' property interests in the same way as a complete taking of land or real property raises serious questions in view of how the term "property" has been understood in this country since the Founding. To James Madison and the other Framers, "property" was a "broad and majestic term." *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *see also Webb's*

Fabulous Pharmacies, 449 U.S. at 161. Shortly after adoption of the Fifth Amendment, Madison wrote that in "its larger and juster meaning" the term property "embraces everything to which a man may have a value and attach a right." 6 J. MADISON, *Essay on Property*, in WRITINGS 101, 103 (Hunt ed. 1906).

Consistent with the Framers' vision, the Supreme Court long has recognized that interests of a far more ephemeral nature than shares of stock constitute property. The "types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *see Carpenter v. United States*, 484 U.S. 19 (1987) (confidential business information including newspaper's publication schedule and contents of column); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's liens); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893) (franchise of a corporation). Indeed, in the modern information age, in which technology plays an increasingly greater role in human affairs, evergrowing portions of societal wealth are represented in relatively intangible form. The Court's conception of property has and should keep pace with these developments, for the term "property" in the Fifth Amendment "gather[s] meaning from experience." *Roth*, 408 U.S. at 571 (quoting *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting)).

While the tangible or intangible interests that constitute "property" are quite varied, each such interest will have the same essential attribute — namely, "the right to exclude others." *Monsanto*, 467 U.S. at 1011. The property interests represented by shares of stock most surely fall within this rubric. Shareholders have a right to receive dividends and periodic capital distributions, the right to vote their shares at annual meetings, and the right to receive excess assets during the life of the corporation and upon its dissolution. Also, shareholders exercise "the right to exclude others" by electing certain directors over others, by

deciding when and to whom they wish to sell shares of stock, and by having sole authority to decide when new stock will be issued. The Comptroller's closure of the Bank had the effect of transferring all these rights from the shareholders to the federal government.

The Federal Circuit's decision attempts to avoid this issue by stating that shareholders had no right to exclude the government from the physical premises of the bank. That is quite true. But it is a matter of basic corporation law that a shareholder's property interests never encompass expectations regarding exclusion of others from a firm's premises. Corporate shareholders *qua* shareholders do not have the right to occupy or possess corporate property themselves, much less to exclude others. A corporation's officers and directors have the exclusive right to control access to corporate property. *See* HENN & ALEXANDER, LAWS OF CORPORATIONS 539 (3d ed. 1983); KLEIN & COFFEE, BUSINESS ORGANIZATION AND FINANCE 313-14 (5th ed. 1992). Thus, to require the right to exclude others from the physical premises of a firm as a *sine qua non* for a taking where the property at issue is stock would exclude shareholders from Fifth Amendment coverage.

CONCLUSION

This is not a case where, after considering the several factors set forth in *Penn Central*, the court below decided that Bancorp's expectations were not sufficient to support a taking claim. Rather, the panel believed that the highly regulated nature of the banking industry was by itself an automatic bar to asserting a taking claim. The panel in effect decided that an airtight expectation is needed to even proceed under *Penn Central*, which is an impossible state of affairs in any regulated industry. This Court's review, therefore, would be confined to the question whether the existence of a complex regulatory scheme — regardless of the economic impact or character of the government's action — is sufficient to defeat a taking claim. The Federal Circuit's decision on this issue is in direct and readily apparent conflict with Supreme Court precedent.

This case also presents the Court with an ideal opportunity to clarify the scope of *per se* takings analysis. *Lucas v. South Carolina Coastal Council*, 112 S.C.t. 2886 (1992), made clear that *per se* analysis applies in the case of a total taking through land use regulation. But the Court's opinion left open the question whether *per se* analysis extends to total takings not involving land.

Respectfully Submitted,

LEONARD A. LEO
4001 N. 9th Street
Suite 707
Arlington, VA 22203
(703) 528-2180
Counsel of Record for Petitioners

JONATHAN R. MACEY
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3469
Of Counsel

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APPENDIX

United States Court of Appeals for the Federal Circuit

92-5141

GOLDEN PACIFIC BANCORP and
MILES P. JENNINGS, JR.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: February 8, 1994

Before LOURIE, CLEVENGER, and SCHALL, *Circuit Judges*.
SCHALL, *Circuit Judge*.

Appellants, Golden Pacific Bancorp (Golden Pacific) and Miles P. Jennings, Jr., appeal from an order of the United States Claims Court, No. 91-1242C (April 28, 1992), dismissing their complaint seeking compensation for a taking under the Fifth Amendment of the United States Constitution. *Golden Pac. Bancorp v. United States*, 25 Cl. Ct. 768 (1992).[1]

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[1] The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, changed the name of the United States Claims Court to the "United States Court of Federal Claims." Except where the context requires otherwise, we refer to the trial court by the name which it had while this matter was pending before it.

Golden Pacific is a bank holding company and owns approximately 90 percent of the stock of Golden Pacific National Bank (Bank). Jennings owns 6,400 shares of the stock of Golden Pacific. Golden Pacific and Jennings filed an action in the Claims Court alleging that the actions of the Comptroller of the Currency (Comptroller) in declaring the Bank insolvent and appointing the Federal Deposit Insurance Corporation (FDIC) as receiver constituted a taking for which they were entitled to compensation under the Fifth Amendment. The Claims Court granted the government's motion for summary judgment after concluding that the actions of the Comptroller did not constitute a compensable taking. *Id.* at 771.[2] For the reasons set forth below, we affirm the judgment of the Claims Court.

BACKGROUND

The pertinent facts are not in dispute. The Bank was a national bank, with its principal place of business in New York City. *Id.* at 769. The Bank was chartered pursuant to 12 U.S.C. § 27 (1988)[3] and subject to the regulatory authority of the Comptroller pursuant to 12 U.S.C. § 1 (1988). *Id.*

Acting on an informant's tip, the Comptroller undertook a surprise investigation of the Bank on June 17, 1985. *Id.* The Comptroller's actions were taken as a result of the Bank's practice of issuing "yellow" certificates of deposit (Yellow CDs). *Id.* The Bank purportedly regarded Yellow CDs as non-book "investments" made by it on behalf of the CD holders. *Id.* Based upon his investigation, however, the Comptroller determined that the Yellow CDs were, in fact, deposits. *Id.* As deposits, the Yellow CDs were liabilities of the Bank, and the Bank was required to maintain offsetting assets, or it would be technically

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[2] The government moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b) of the United States Claims Court (RUSCC), or in the alternative, for summary judgment. We agree with the parties that, in dismissing the complaint, the Claims Court granted the motion for summary judgment.

[3] The 1988 version of the United States Code contains the statutory provisions which were in effect at the time of the events in question.

insolvent. *Id.*[4] Since the Comptroller was not satisfied that the Bank possessed such assets, he began preparing a cease and desist order to halt the practice of issuing Yellow CDs. *Id.* Before the cease and desist order could be issued, however, rumors of the Comptroller's investigation precipitated a run on the Bank. *Id.* Faced with what he regarded as inadequate assets and a run on the Bank, the Comptroller declared the Bank insolvent pursuant to 12 U.S.C. § 191[5] and placed it in FDIC receivership pursuant to 12 U.S.C. § 1821(c)[6]. *Id.*

After the Bank was closed, Golden Pacific brought an action in the United States District Court for the District of Columbia. In its district court complaint, Golden Pacific sought (i) review of the Comptroller's actions under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1988), alleging that the Comptroller's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" (ii) damages from the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2680(a) (1988), for the Comptroller's actions; and (iii) damages and injunctive relief under the Fifth Amendment. On December 1, 1986, the district court granted summary judgment for the government. *Golden Pac. Bancorp v. Clarke*, No. 85-2384, slip op. at 1 (D.D.C. Dec. 1, 1986). In so doing, the district court addressed Golden Pacific's APA and FTCA claims. After considering the administrative

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[4] In general, ordinary bank CDs are written acknowledgements issued by a bank for interest-bearing time deposits maturing on a specific date. With the exception of their color, Yellow CDs had the same physical appearance as ordinary bank CDs because they bore the Bank's name and stated a fixed rate of interest and maturity date. The Yellow CDs were also honored by the Bank upon demand or maturity, like ordinary bank CDs. *Golden Pac. Bancorp*, 25 Cl. Ct. at 769.

[5] "[W]henever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, . . . appoint a receiver, who shall proceed to close up such association." *See* 12 U.S.C. § 191 (1988) (current version at 12 U.S.C. § 191 (Supp. IV 1992)).

[6] "[W]henever the Comptroller of the Currency shall appoint a receiver other than a conservator . . ., he shall appoint the [Federal Deposit Insurance] Corporation receiver for such closed bank." *See* 12 U.S.C. § 1821(c) (1988) (current version at 12 U.S.C. § 1821(c)(2)(A)(ii) (Supp. IV 1992)).

record, the district court concluded that, in declaring the Bank insolvent and placing it in receivership, the Comptroller had acted within the scope of his statutory authority and that his actions were not arbitrary, capricious, or undertaken in bad faith. *Id.* at 6.[7]

The district court did not address Golden Pacific's claim under the Fifth Amendment for monetary and injunctive relief. Golden Pacific had acknowledged at an earlier stage of the proceedings that any monetary claim it was asserting against the government sounded in tort. Thus, when the district court granted the government's motion for summary judgment, Golden Pacific was no longer asserting any monetary claims under the Fifth Amendment.[8] As far as Golden Pacific's claim for injunctive relief under the Fifth Amendment was concerned, it appears that the district court either overlooked the claim or viewed its decision with respect to the APA and FTCA claims as being dispositive of any request for injunctive relief.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court judgment. *Golden Pac. Bancorp v. Clarke*, 837 F.2d 509, 513 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988). The court of appeals determined that Golden Pacific's action was "nothing more than a

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[7] The Comptroller's conclusion that Yellow CDs were bank liabilities was separately confirmed by a federal district court in an action brought by the FDIC. *See FDIC v. Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (S.D.N.Y. Sept. 16, 1986).

[8] After Golden Pacific's complaint was filed in the district court, the government moved to dismiss for lack of subject matter jurisdiction that part of Golden Pacific's claim that sought monetary relief and did not sound in tort. The government argued that under the Tucker Act, 28 U.S.C. § 1491 (1988), the district court only had jurisdiction over non-tort monetary claims not exceeding $10,000 and that Golden Pacific had not stated that its non-tort claim was limited to below $10,000. Responding to the government's motion, the district court stated: "The court agrees with plaintiff that this is a tort action and tort relief is requested. The Tucker Act only applies to cases 'not sounding in tort' and therefore has no application here." *Golden Pac. Bancorp v. Selby*, No. 85-2384, slip op. at 4 (D.D.C. Feb 7, 1986).

claim for damages under the FTCA." *Id.* at 510.[9] The court concluded, however, that a FTCA cause of action was not available to Golden Pacific because the Comptroller's actions fell within the discretionary function exception to the FTCA. *Id.* at 511-512.[10] The court declined to reach Golden Pacific's claim under the Fifth Amendment because it was argued on appeal only in a reply brief. *Id.* at 513.

On June 21, 1991, appellants filed an action in the Claims Court, alleging that the Comptroller's actions constituted a compensable taking under the Fifth Amendment, a breach of an implied contract between the Comptroller and the Bank and its shareholders, and a mistake of fact.[11] In response, the government moved to dismiss for lack of subject matter jurisdiction, or in the alternative, for summary judgment, asserting that res judicata barred the taking claim under the Fifth Amendment and that the Comptroller's actions did not constitute a compensable taking under the Fifth Amendment.

The Claims Court held that the actions of the Comptroller in declaring the Bank insolvent and placing the Bank in FDIC receivership did not constitute a compensable taking under the Fifth Amendment. *Golden Pac. Bancorp*, 25 Cl. Ct. at 771. The

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[9] The court saw the APA as merely serving "as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller." *Golden Pac. Bancorp*, 837 F.2d at 511.

[10] The FTCA authorizes damage suits agains the United States for negligent or wrongful acts or omissions of its employees. 28 U.S.C. § 1346(b) (1988). However, the FTCA limits such actions by exempting

> . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1988).

[11] Subsequently, appellants abandoned their implied-contract and mistake-of-fact claims during oral argument before the Claims Court.

Claims Court determined that appellants "lacked 'one of the most essential sticks in the bundle of rights that are commonly characterized as property — the right to exclude others.'" *Id.* at 770 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 174, 179-180 (1979)). Without the right to exclude others, the court stated, appellants did "not have the 'historically rooted expectation of compensation' necessary to establish a fifth amendment taking." *Id.* at 770-771 (quoting *California Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir.), *cert. denied*, 113 S. Ct. 324 (1992)). The court also stated that appellants' "reasonable investment-backed expectations could not possibly have been interfered with given the highly regulated nature of the banking industry." *Id.* at 771. Since it found the Fifth Amendment issue to be dispositive, the Claims Court did not address the government's contention regarding res judicata. *Id.* at 771 n.3. This appeal followed.

DISCUSSION

A. *Standard of Review*

"Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citations omitted). In reviewing a grant of summary judgment by a trial court, we determine whether the standards for summary judgment have been met and are not bound by the trial court's ruling that there was no material factual dispute present in the case. *Id.* at 1390. In this case, there is no genuine issue of material fact, and the Claims Court did not err in concluding that the government was entitled to judgment as a matter of law.

B. *Analysis*

As a preliminary matter, the government argues that Golden Pacific's taking claim is barred by the doctrine of res judicata, in the sense of claim preclusion, based upon the district court judgment and the affirmance of that judgment on appeal. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies

based upon the same claim or cause of action. 1B James W. Moore et al., Moore's Federal Practice ¶ 0.401[1] (2d ed. 1993).

The doctrine of res judicata does not apply because Golden Pacific's taking claim before the Claims Court was not the same as Golden Pacific's APA and FTCA claims before the district court. The taking claim was never litigated in the district court action. As noted above, the district court regarded Golden Pacific's action as, for all intents and purposes, a tort action requesting tort relief, *see supra* note 8, as did the D.C. Circuit.[12] The district court also did not discuss Golden Pacific's claim for injunctive relief under the Fifth Amendment in its decision granting summary judgment for the government. Moreover, the taking claim could not have been litigated, in the district court action, in view of the fact that the district court lacked subject matter jurisdiction over Golden Pacific's taking claim because it was a non-tort monetary claim exceeding $10,000. *Golden Pac. Bancorp v. Selby*, No. 85-2384, slip op. at 4 (D.D.C. Feb. 7, 1986). Accordingly, Golden Pacific's taking claim is not barred by the doctrine of res judicata because the suit before the Claims Court was not based upon the same claim as the suit before the district court.

Turning to the merits, the Fifth Amendment states that "private property [shall not] be taken for public use without just compensation." A regulatory imposition may result in a compensable taking in either of two ways. First, as a result of a regulatory scheme, a property owner may suffer a physical invasion or permanent occupation of his or her property. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the

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[12] That a tort claim is what was really involved in the district court action is borne out by the following statement from the decision of the D.C. Circuit:

> [A]t oral argument counsel for appellant conceded that the only relief appellant seeks is monetary damages; no specific relief under the APA is any longer – if it ever was – at issue. Golden Pacific's claim under the APA, it seems to us, serves only as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller.

Golden Pac. Bancorp, 837 F.2d at 511.

Supreme Court stated that a regulation that compels a property owner to "suffer a physical 'invasion' of his property" is a category of regulatory action which is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 2893. In general, in the case of physical invasions, the Court pointed out, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.*[13] Thus, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that placement of certain equipment on a building pursuant to a New York statute requiring a landlord to permit installation of cable television facilities on her property at a government-fixed rate was a taking because it constituted a physical occupation of her property. In *Loretto*, the Court concluded that "a permanent physical occupation authorized by [the] government is a taking without regard to the public interests that it may serve." *Id.* at 426. In addition, the Court stated that "[i]n such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. The kind of physical invasion and permanent occupation that was involved in *Loretto* has been referred to as a taking per se. *See id.* at 442.

A regulatory scheme may also result in a compensable taking without a physical invasion or occupation of property. Such a taking occurs "when regulations go 'too far' and impinge on private freedom." John A. Humbach, "*Taking*" *the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 Cath. U. L. Rev. 771, 777 (1993) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). In *Mahon*, the claimant had sold the surface rights to particular parcels of property but had reserved the right to remove the coal underlying the parcels. A Pennsylvania statute which was enacted after these transactions prohibited any

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[13] The Court in *Lucas* stated that an additional "situation in which . . . categorical treatment [is] appropriate is where regulation denies all economically beneficial or productive use of land." *Id.*

mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, the Supreme Court held that the statute effected a taking without just compensation. 260 U.S. at 414-15. In the words of Justice Holmes, the Pennsylvania statute went "too far." *Id.* at 415.

In cases where a regulatory scheme does not involve a physical invasion or occupation of property, the Supreme Court "has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action'" must be deemed a compensable taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *accord Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). The type of case-by-case approach that is required is set forth in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984):

> The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. *Kaiser Aetna*, 444 U.S. at 175. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Prune-Yard Shopping Center v. Robins*, 447 U.S. [74] at 83 [1980]; *see Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124.

467 U.S. at 1005.

Golden Pacific's principal argument on appeal is that the highly regulated nature of the banking industry does not preclude its taking claim. Put another way, Golden Pacific

contends that the Claims Court erred when it held, 25 Cl. Ct. at 770-71, that Golden Pacific did not have the historically rooted expectation of compensation necessary to establish a Fifth Amendment taking and that the Comptroller's actions did not interfere with any reasonable investment-backed expectations on the part of Golden Pacific. Golden Pacific also argues that, in declaring the Bank insolvent and placing it in FDIC receivership, the Comptroller "reneged" on a prior commitment to value Yellow CDs in determining bank solvency, and that the closure of the "solvent" Bank without shareholder compensation failed to advance a legitimate government purpose and deprived Golden Pacific of its property within the meaning of the Fifth Amendment. We turn first to Golden Pacific's principal argument.

In arguing that the actions of the Comptroller vis-a-vis the Bank constituted a taking for which compensation is due, Golden Pacific appears to rely both upon a per se analysis and also upon an analysis grounded in the factors set forth above in *Monsanto*. This is not surprising. On the one hand, when the Comptroller placed the Bank in FDIC receivership for liquidation there was, in a very real sense, a physical invasion and permanent occupation, certainly as far as the premises of the Bank were concerned. On the other hand, the Comptroller did not actually take Golden Pacific's property, its shares of stock in the Bank. Rather, it may be argued that, through his actions, the Comptroller reduced, if not eliminated, the value of those shares. Thus, Golden Pacific states that "[t]he property rights that the shareholders are seeking to vindicate have absolutely nothing to do with their right to physical possession and management of the bank's premises." According to Golden Pacific, "[t]he shareholders maintain that the government's action deprived them of the value of their stock. They are not seeking to redress wrongs to the corporation." However, we need not decide the question whether the claim of a party in Golden Pacific's situation is for a taking per se or for a taking that is found after an analysis of the factors stated in *Monsanto*. The reason is that, whichever way one looks at this case, Golden Pacific is unable to establish a compensable taking.[14]

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[14] Appellant Jennings has no claim independent of those of Golden Pacific. Therefore, our decision regarding Golden Pacific's claim disposes of Jennings' appeal.

The resolution of this case is controlled by our decision in *California Housing Securities*. There, California Housing Securities, Inc. (CHS) sought compensation for an alleged taking under the Fifth Amendment, based upon the appointment and subsequent actions of the Resolution Trust Corporation (RTC) as conservator and receiver of Saratoga Savings and Loan Association (Saratoga). *California Hous. Sec.*, 959 F.2d at 957. In so doing, CHS relied on *Loretto* in contending that the actions of the government resulted in a permanent occupation and physical taking of Saratoga's property in violation of the Fifth Amendment's taking clause. We held that the "RTC's occupation and seizure of Saratoga, and its subsequent liquidation of Saratoga's assets, cannot constitute a physical fifth amendment taking because neither Saratoga nor CHS could have developed a historically rooted expectation of compensation for such a seizure." *Id.* at 958. "Saratoga lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on Saratoga." *Id.* Thus, "[a]s a consequence of the regulated environment in which Saratoga voluntarily operated, Saratoga and CHS held less than the full bundle of property rights." *Id.* In reaching our conclusion in *California Housing Securities*, we reviewed the pertinent regulatory scheme, *id.* at 955-956, and pointed out that when Saratoga obtained federal deposit insurance, it voluntarily subjected itself to the highly regulated banking industry. "It is well known that '[b]anking is one of the longest regulated and most closely supervised of public callings.'" *Id.* at 958 (quoting *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)).

The regulatory scheme applicable to federally-insured savings and loan associations, such as Saratoga in *California Housing Securities*, is similar to the regulatory scheme applicable to national banks, such as the Bank here. *Compare* 12 U.S.C. § 1464(d)(6)(A) (1988) (grounds for appointment of receiver for savings and loan association) (current version at 12 U.S.C. § 1464(d)(2)(A) (Supp. IV 1992)) *with* 12 U.S.C. § 191 (1988) (grounds for appointment of receiver for national banking association) (current version at 12 U.S.C. § 191 (Supp. IV 1992)). Golden Pacific voluntarily entered into the highly regulated

banking industry by choosing to invest in the Bank. The actions of the Comptroller simply enforced "portions of an extensive regulatory scheme designed to promote the public interest in a sound banking system." *American Continental Corp. v. United States*, 22 Cl. Ct. 692, 696 (1991). At those times when the Comptroller could legally inspect the Bank or place it in receivership, the Bank – which Golden Pacific owned – was unable to exclude the government from its property. *See California Hous. Sec.*, 959 F.2d at 958. Just as Saratoga did not have the right to exclude the RTC in *California Housing Securities*, the Bank did not have the right to exclude the Comptroller. Consequently, neither the Bank nor Golden Pacific "could have developed a historically rooted expectation of compensation" for the seizure which resulted from the Comptroller's actions. 959 F.2d at 958. For this reason, Golden Pacific's *Loretto* claim fails.

Golden Pacific fares no better if its claim is viewed as one based upon a regulatory taking not involving the physical invasion or occupation of property. We need only focus upon the third of the three factors set forth above in *Monsanto*: interference with reasonable investment-backed expectations. *Monsanto* teaches that "the force of this factor [may be] so overwhelming . . . that it disposes of the taking question . . . ." 467 U.S. at 1005. Indeed, that is precisely the case here. Given the highly regulated nature of the banking industry, just as under a *Loretto* analysis Golden Pacific could not have had a historically rooted expectation of compensation for the Comptroller's actions, so too, the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation on the part of Golden Pacific. Put most simply, Golden Pacific could not have reasonably expected that the government "would fail to enforce the applicable statutes and regulations." *See American Continental*, 22 Cl. Ct. at 697. Indeed, Golden Pacific's expectations could only have been that the FDIC would exert control over the Bank's assets if the Comptroller became satisfied that the Bank was insolvent and chose to place it in receivership. *See* 12 U.S.C. § 191 (1988) ("whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may . . . appoint a receiver, who shall proceed to close

up such association") (current version at 12 U.S.C. § 191 (Supp. IV 1992)).

Golden Pacific's reliance on *Monsanto*, 467 U.S. 986 (1984), and *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) is misplaced. In *Monsanto*, the Supreme Court found a regulatory taking of proprietary trade secrets by reason of a federal statute forcing disclosure of the trade secrets. 467 U.S. at 1016. In *United Nuclear*, this court found a regulatory taking in an agency action dispossessing a plaintiff's leasehold interest in Indian lands. 912 F.2d at 1433. However, the trade secret interest in *Monsanto* and the leasehold interest in *United Nuclear* are fundamentally different from the interest represented by Golden Pacific's investment in the Bank. Monsanto and United Nuclear each possessed reasonable investment-backed expectations, the reason being that, inherent in each of their respective interests — Monsanto's ownership of trade secrets and United Nuclear's status as a lessee — was, in one sense or another, the right to exclude others. *See Monsanto*, 467 U.S. at 1011 ("[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest"); *United Nuclear*, 912 F.2d at 1436 ("The fact that United agreed that the leases would be subject to future regulation does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million.") As we stated in *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991), "[i]n the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to *exclude* strangers, or for that matter friends, but especially the Government." By contrast, as already seen, Golden Pacific did not possess either the historically rooted expectation of compensation or the reasonable investment-backed expectation necessary to support a Fifth Amendment taking because it chose to invest in an entity — the Bank — which did not possess the right to exclude others. And the reason the Bank did not possess the right to exclude others — most notably the Comptroller — was that the Bank was a member of a highly regulated industry.

Golden Pacific's second argument – that the government "reneged on a commitment to value Yellow CDs" – is based upon the contention that the Bank engaged in the same "investment" practice in 1981 as it did in 1985 and was not criticized for it then. It appears that Golden Pacific is making this argument in order to have us conclude that conduct on the part of the Comptroller in 1981 created a regulatory environment of non-interference as far as the Bank's Yellow CD program was concerned. Presumably, Golden Pacific would have us hold, based upon that conclusion, that it did in fact have the kind of reasonable investment-backed expectation necessary to support a taking claim. Specifically, so the argument goes, by reason of the actions of the Comptroller, an expectation arose that the value of Golden Pacific's investment in the Bank would not be diminished by any actions of the Comptroller stemming from a finding that the Yellow CD program was improper or stemming from a refusal by the Comptroller "to credit the asset side of [the Bank's] balance sheet when treating the Yellow CDs as liabilities." Stated another way, Golden Pacific is arguing that the Comptroller's alleged conduct vis-a-vis the Yellow CD program had the effect of creating a regulatory environment different from the one which compelled our holding in *California Housing Securities*.

There are two problems with this line of argument. First, the district court found, as a factual matter, that there was no conduct on the part of the Comptroller in 1981 that amounted to a commitment with respect to the treatment of the Yellow CDs. Golden Pacific is collaterally estopped from contesting that finding. "Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the parties." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)).[15] Thus, the factual underpinning for Golden Pacific's argument is lacking. Second, and more fundamentally,

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[15] For this reason, contrary to Golden Pacific's contention, there is no genuine issue of material fact on this point.

even if the necessary factual predicate did exist, it would be of no help to Golden Pacific. Even if in 1981 the Comptroller had made the kind of "commitment" asserted by Golden Pacific, he would not have been estopped from concluding in 1985 that he had made a mistake and from acting accordingly. *See Schweiker v. Hansen*, 450 U.S. 785, 789-790 (1981) (government cannot be estopped from enforcing compliance with valid regulation merely because it has not enforced that regulation in the past). Consequently, even if the conduct on the part of the Comptroller alleged by Golden Pacific had taken place, it would not have changed the regulatory environment so as to compel a result different from the one reached in *California Housing Securities*.[16]

Golden Pacific's final argument – that the Comptroller closed a solvent Bank and therefore failed to advance a legitimate government interest – requires little discussion. Golden Pacific is arguing that the Comptroller "made a mistake" when he closed the Bank and that therefore compensation is due under the Fifth Amendment. This argument assumes, of course, that Golden Pacific had either the historically rooted expectation of compensation or reasonable investment-backed expectation necessary to support a taking claim, which it did not. That point aside, though, a mistake may give rise to a due process claim, but not a taking claim. *Tabb Lakes*, 10 F.3d at 803. And the due process clause of the Constitution is not a money-mandating provision. *See Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (the due process clause "standing alone, cannot be . . . interpreted to command the payment of money"). Such a

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[16] We do not understand Golden Pacific to be arguing that, because the Comptroller reneged on a commitment, his actions in declaring the Bank insolvent and placing it in receivership were not authorized. A taking claim depends upon the validity of the government's action. "This is because a 'Tucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication.'" *Tabb Lakes Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (citations omitted). Neither do we understand Golden Pacific to be arguing the breach of contract claim which it abandoned before the Claims Court and which it therefore may not raise on appeal. *See Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 767 (Fed. Cir. 1988) ("arguments not presented to the trial court . . . are deemed waived on appeal").

money-mandating provision is required for a suit, such as this, under the Tucker Act. *United States v. Mitchell*, 463 U.S. 206, 216 (1983). Golden Pacific's mistake argument must be rejected.

CONCLUSION

In its ownership of the Bank, Golden Pacific did not have either the historically rooted expectation of compensation or the reasonable investment-backed expectation necessary to support a Fifth Amendment taking claim. Accordingly, the judgment of the Claims Court is affirmed.

Each side shall bear its own costs.

AFFIRMED

United States Court of Appeals for the Federal Circuit

92-5141

GOLDEN PACIFIC BANCORP. and
MILES P. JENNINGS, JR.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on March 25, 1994.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: March 18, 1994

By s/s Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: LEONARD A. LEO
JOAN M. BERNOTT

FILED
U.S. COURT OF
APPEALS FOR
THE FEDERAL CIRCUIT
MAR 18 1994
FRANCIS X. GINDHART
CLERK

GOLDEN PACIFIC
BANCORP V US,
92-5141
(CLM - 91-1242C)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

92-5141

GOLDEN PACIFIC BANCORP. and
MILES P. JENNINGS, JR.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

United States Court of Appeals for the Federal Circuit

92-5141

GOLDEN PACIFIC BANCORP. and
MILES JENNINGS, JR.,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

An order dated March 18, 1994, denying the petition for rehearing and declining the suggestion for rehearing in banc having been issued in error,

IT IS ORDERED THAT:

(1) The order is vacated; and

(2) Appellee is requested to file a response to appellant's combined petition for rehearing and suggestion for rehearing in banc, in accordance with Federal Circuit Rules 35 and 40, within 14 days from the date of this order.

FOR THE COURT,
s/s Francis X. Gindhart
Francis X. Gindhart
Clerk

3/23/94

cc: Leonard A. Leo
Joan M. Bernott

FILED
U.S. COURT OF
APPEALS FOR
THE FEDERAL CIRCUIT
MAR 23 1994
FRANCIS X. GINDHART
CLERK

United States Court of Appeals for the Federal Circuit

92-5141

GOLDEN PACIFIC BANCORP. and
MILES P. JENNINGS, JR.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 26, 1994.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: April 19, 1994

By s/s Diane M Frye
Diane M. Frye
Chief Deputy Clerk

cc: LEONARD A. LEO
JOAN M. BERNOTT

GOLDEN PACIFIC
BANCORP V US,
92-5141
(CLM - 91-1242C)

FILED
U.S. COURT OF
APPEALS FOR
THE FEDERAL CIRCUIT
APR 19 1994
FRANCIS X. GINDHART
CLERK

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

In the United States Claims Court

No. 91-1242C
(Filed: April 28, 1992)

* *

GOLDEN PACIFIC BANCORP and MILES P. JENNINGS, JR.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Taking; Bank Charter And Value Of Stock; Authority of Comptroller Of Currency; Highly Regulated Industry; Definition Of Property That Can Be Taken.

* *

Jethro M. Eisenstein, New York, New York, for plaintiffs.

Allen D. Bruns, Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson*, for defendant.

ORDER

TIDWELL, Judge:

This case is before the court on defendant's motion to dismiss for lack of subject-matter jurisdiction, or in the alternative, for summary judgment. For the reasons set forth below, the court grants defendant's motion to dismiss.

FACTS

Golden Pacific National Bank (Bank) is a national bank, chartered pursuant to 12 U.S.C. § 27 (1988), with its principal

place of business in New York. Plaintiffs are Golden Pacific Bancorp (Golden Pacific), which owns approximately 90 percent of Bank's stock, and Miles P. Jennings who owns 6,400 shares of Golden Pacific stock.

On June 17, 1985, acting on an informant's tip, the Comptroller of the Currency undertook a surprise investigation of the Bank. The Comptroller found that the Bank had issued certificates of deposit which were not recorded on the Bank's books, nor made available to bank examiners during routine examinations. The certificates were known, because of their color, as "Yellow CDs," and were treated as standard certificates of deposit. They bore the Bank's name, stated a fixed interest rate and maturity date, and were consistently honored upon demand or maturity. Bank officials treated the Yellow CDs as investments, but the Comptroller determined them to be deposits, and thus liabilities of the Bank. As liabilities, offsetting assets were required to be maintained by the Bank, or it would be technically insolvent. Although Bank officials claimed that the Bank held assets sufficient to offset the Yellow CDs, the Comptroller was not satisfied that such assets existed and determined that the Bank was engaged in "unsafe and unsound banking practices." The Comptroller began preparing a cease-and-desist order directing the Bank to stop the sale of Yellow CDs, but before the order could issue, news of a run on the Bank caused the Comptroller to declare the Bank insolvent and place it in receivership.

Plaintiffs filed suit in the United States District Court for the District of Columbia, seeking a review of the Comptroller's actions under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (1988), and requesting damages under the Federal Torts Claim Act (FTCA), 28 U.S.C. §§ 1346, 2680(a) (1988), and the Fifth Amendment. The District Court granted summary judgment for defendant on the FTCA claim, *Golden Pac. Bancorp v. Clarke*, No. 85-2384 (D.D.C. Feb. 7, 1986), and on the APA claim, *Golden Pac. Bancorp v. Clarke*, No. 85-2384 (D.D.C. Dec. 1, 1986), but did not decide the fifth amendment claim. On appeal, the District Court's decisions were affirmed by the United States Court of Appeals for the District of Columbia.

Golden Pac. Bancorp v. Clarke, 837 F.2d 509 (D.C. Cir.), *cert. denied*, 488 U.S. 890 (1988). The Court of Appeals did not address the takings issue since plaintiffs did not timely raise that issue.

On June 21, 1991, plaintiffs filed a complaint in this court, alleging that the actions of the Comptroller constituted a taking under the Fifth Amendment, a breach of an implied contract between the Comptroller and the Bank and its shareholders, and a mistake of fact.[1]

DISCUSSION

The Fifth Amendment guarantees that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This right was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). No "set formula" has been developed to determine when "economic injuries caused by public action [should] be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Cent. Transp. v. City of New York*, 438 U.S. 104, 124 (1978). However, courts have engaged in "ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed [*sic*] expectations, and the character of the governmental action – that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). In the present case, only the result of the Comptroller's actions has been challenged – not their propriety.[2] Specifically,

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[1] During oral argument on April 7, 1992, plaintiffs abandoned their implied-contract and mistake-of-fact claims.

[2] The discretion of the Comptroller cannot be challenged in this forum; such an allegation would sound in tort, and therefore be outside this court's Tucker Act jurisdiction. *Sharp v. United States*, 215 Ct. Cl. 883 (1977); *see* 28 U.S.C. § 1491(a) (1988). Though plaintiffs admitted that the Comptroller had the authority to take the actions he did, they also argued that they were entitled to just compensation.

plaintiffs argued that the "closure and destruction of a solvent bank" constituted a taking under the Fifth Amendment. The court disagrees.

"Banking is one of the longest regulated and most closely supervised of public callings." *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947). "[F]ederal agencies such as the Office of the Comptroller of the Currency . . . are charged with the task of overseeing [our national] banking system for the protection of the public and the national economy as a whole, and not for the benefit or protection of individual banking institutions." *First Nat'l Bank of Scotia v. United States*, 530 F. Supp. 162, 166 (D.D.C. 1982). Pursuant to the regulatory scheme created by Congress, the Comptroller is authorized to issue cease-and-desist orders, impose civil money penalties, or remove officers or directors pursuant to statutory procedures whenever a bank refuses to obey the law, or persists in unsafe and unsound banking practices. 12 U.S.C. § 1818 (1988). If the Comptroller becomes "satisfied of the insolvency of a national banking association, he may, after due examination of its affairs . . . appoint a receiver, who shall proceed to close up such association." 12 U.S.C. § 191 (1988).

Plaintiffs voluntarily chose to invest in the Bank. In essence, they were "on reasonable notice as to what the 'rules of the game' were, or reasonably could be, in the highly regulated banking industry." *American Continental Corp. v. United States*, 22 Cl. Ct. 692, 698 (1991). The actions of the Comptroller simply enforced "portions of an extensive regulatory scheme designed to promote the public interest in a sound banking system." *Id.* at 696. Although the court recognizes that extensive regulation of property may constitute a taking, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), plaintiffs in this case lacked "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Kaiser*, 444 U.S. at 176, 179-80; *accord Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). At those times when the government could legally inspect the Bank or

place it into receivership, plaintiffs were unable to exclude the government from their property. *See California Hous. Sec. v. United States*, No. 91-5092, slip op. at 8-9 (Fed. Cir. March 24, 1992). Without the right to exclude others, plaintiffs do not have the "historically rooted expectation of compensation" necessary to establish a fifth amendment taking. *California Hous. Sec.*, slip op. at 8.

Contrary to their arguments, all the significant factors identified in *Kaiser* weigh against plaintiffs' case. First, the "governmental action" by the Comptroller is most properly characterized as promoting "the public interest in a sound banking system." *American Continental*, 22 Cl. Ct. at 696. Second, plaintiff's reasonable investment-backed expectations could not possibly have been interfered with given the highly regulated nature of the banking industry which pre-existed their investment. *Id.* at 697. Third, the economic impact of the regulation is slight since the Comptroller only acted to preserve the integrity of the Bank after its officials had engaged in "unsafe and unsound" business practices – a benefit to the Bank's shareholders. The only actions taken were those that plaintiffs should have reasonably expected as investors in the banking industry, and the court finds no taking to have occurred.[3]

[3] Since the court finds the fifth amendment issue to be dispositive, it need not address defendant's arguments regarding plaintiffs' standing to sue in this court, or res judicata.

CONCLUSION

For the reasons stated, the court finds that the actions of the Comptroller did not constitute a taking under the Fifth Amendment. Accordingly, the court lacks subject-matter jurisdiction and defendant's motion to dismiss is granted. The Clerk of the court is directed to dismiss the complaint without prejudice. No costs.

IT IS SO ORDERED.

/s/ M.R. Tidwell

MOODY R. TIDWELL
Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST., AMEND. V. (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

12 U.S.C. § 191 (1988)

[W]henever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, . . . appoint a receiver, who shall proceed to close up such association.

(2)
Supreme Court, U.S.
FILED
OCT 6 1994
CLERK

No. 94-96

In the Supreme Court of the United States

OCTOBER TERM, 1994

GOLDEN PACIFIC BANCORP AND
MILES P. JENNINGS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JULIE L. WILLIAMS
Chief Counsel

ROBERT B. SERINO
Deputy Chief Counsel

L. ROBERT GRIFFIN
ROSA KOPPEL
DAVID C. DOUGLAS
Attorneys
Office of the Comptroller of the Currency
Washington, D.C. 20219

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QUESTION PRESENTED

Whether the actions of the Comptroller of the Currency in declaring Golden Pacific National Bank insolvent and appointing the Federal Deposit Insurance Corporation as receiver constituted a compensable taking under the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-96

GOLDEN PACIFIC BANCORP AND
MILES P. JENNINGS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 15 F.3d 1066. The opinion of the district court (Pet. App. A23-A28) is reported at 25 Cl. Ct. 768.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1994. A petition for rehearing was denied on April 26, 1994. Pet. App. A21-A22. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Golden Pacific Bancorp (Bancorp) owns approximately 90% of the stock of Golden Pacific National Bank (Bank). Petitioner Miles P. Jennings, Jr. is a shareholder of Bancorp. After unsuccessfully pursuing litigation in federal district court, petitioners filed the present suit against the United States in the United States Claims Court,[1] asserting that the Comptroller of the Currency (Comptroller) effected a compensable taking of petitioners' property when he placed the Bank—which he believed to be insolvent—in receivership. The Claims Court rejected petitioners' claim. Pet. App. A23-A28. The Court of Appeals for the Federal Circuit affirmed. *Id.* at A1-A16.

1. In June 1985, the Comptroller received an informant's tip that the Bank was issuing "yellow" certificates of deposit (yellow CDs),[2] but failing to record them on its books as deposits. Pet. App. A2. Acting on this tip, the Comptroller initiated a surprise investigation of the Bank. *Ibid.* At the conclusion of that investigation, the Comptroller determined that the

[1] Pursuant to the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX § 902(a), 106 Stat. 4516, the name of the United States Claims Court was changed to the "United States Court of Federal Claims." We refer to that court hereinafter as the "Claims Court."

[2] The certificates were known as "yellow CDs" because of their color. Like standard certificates of deposit, the yellow CDs bore the Bank's name, stated a fixed rate of interest and maturity date, and were honored by the Bank on demand or maturity. Pet. App. A24. The Bank contended that the yellow CDs were not deposits, which are liabilities of a bank to its customers, but instead investments by the Bank, as custodian, on behalf of its customers' accounts. *Id.* at A2. Under the Bank's characterization, the yellow CDs should have had no impact on the Bank's balance sheet.

yellow CDs were deposits and, as such, had to be accounted for as liabilities of the Bank. *Ibid.*[3] Because the Bank did not prove to the Comptroller's satisfaction that it possessed sufficient assets to offset the liabilities evidenced by the yellow CDs, the Comptroller began to prepare a cease and desist order to prevent any further issuance of yellow CDs by the Bank. *Id.* at A3.

Before the cease and desist order could be issued, however, bank examiners learned of a run on the Bank. Confronted with this situation, and believing that the Bank possessed inadequate assets, the Comptroller declared the Bank insolvent, under 12 U.S.C. 191, and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver, under 12 U.S.C. 1821(c). Pet. App. A3.[4]

2. After the Bank had been placed in receivership, petitioners filed suit against the Comptroller in the United States District Court for the District of Columbia, asserting claims under the Administrative Procedure Act (APA), the Federal Tort Claims Act (FTCA) and the Fifth Amendment. Pet. App. A3. The district court granted summary judgment for the government, without addressing petitioners' Fifth

[3] The Comptroller's determination that the yellow CDs should have been treated as Bank liabilities was subsequently upheld by a federal district court, in an action brought by the Federal Deposit Insurance Corporation (FDIC). See Pet. App. A4 n.7 (citing *FDIC* v. *Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (S.D.N.Y. Sept. 16, 1986)).

[4] The Bank's president, Joseph Chuang, and a vice-president, Theresa Shieh, were subsequently convicted for, among other things, using false statements, fraudulent documents, phoney signatures, and off-book transactions to deceive federal bank regulators about the Bank's true financial condition. *United States* v. *Chuang*, 897 F.2d 646 (2d Cir.), cert. denied, 498 U.S. 824 (1990).

Amendment claim. *Id.* at A4. Based on its review of the administrative record, the district court concluded that the Comptroller had acted reasonably and within his statutory authority in closing the Bank. *Id.* at A3-A4 (citing *Golden Pac. Bancorp* v. *Clarke*, No. 85-2384 (D.D.C. Dec. 1, 1986)). The court of appeals affirmed, but did not consider petitioners' Fifth Amendment claim because petitioners had raised the claim on appeal only in their reply brief. Pet. App. A4-A5; *Golden Pac. Bancorp* v. *Clarke*, 837 F.2d 509, 513 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988).

3. Petitioners then filed this lawsuit in the Claims Court, asserting once again that the actions of the Comptroller constituted a compensable taking under the Fifth Amendment. The Claims Court granted the government's motion for summary judgment, holding that the Comptroller's actions did not amount to a taking. Pet. App. A23-A28.

On appeal, the Federal Circuit concluded that, regardless of whether the petitioners' claims were judged under a *per se* takings analysis or under the "ad-hoc, factual" analysis employed in cases not involving physical invasion of property, petitioners could establish no Fifth Amendment violation. Pet. App. A9-A10. Addressing petitioners' per se takings claim, the court noted that "[a]t those times when the Comptroller could legally * * * place [the Bank] in receivership, the Bank * * * was unable to exclude the government from its property." *Id.* at A12. Consequently, neither the Bank nor its shareholders "'could have developed a historically rooted expectation of compensation' for the seizure which resulted from the Comptroller's actions." *Ibid.* For the same reason, the court held, petitioners could not demonstrate the interference with "reasonable

investment-backed expectations" needed to establish a regulatory taking. *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 11) that the court of appeals rejected their takings claim solely on the ground that the Bank was "a member of a highly regulated industry." Petitioners argue (Pet. 12) that this broad holding will "foreclose takings claims in vast areas of the nation's economic life."

Petitioners misconstrue the scope of the court of appeals' opinion, which is grounded in the specific facts of this case. The opinion focuses closely on the particular statute at issue, 12 U.S.C. 191, which provided (both at the time petitioners invested in the Bank and at the time the Comptroller declared the Bank insolvent) that "whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination * * * appoint a receiver." 12 U.S.C. 191. As petitioners had voluntarily invested in the Bank, the court found that petitioners should be deemed to have incorporated into their "reasonable investment-backed expectations" the potential impact on the Bank of the possible closure of the Bank by the Comptroller under Section 191 if the Comptroller were to become satisfied (rightly or wrongly) that the Bank had become insolvent. Pet. App. A12 ("Golden Pacific could not have reasonably expected that the government 'would fail to enforce the applicable statutes and regulations.'"). Because the possibility that the Comptroller could close the Bank was apparent on the face of Section 191, the court held that petitioners could not have "developed a historically rooted expectation of compensation" for a receivership instituted under that statute. Pet. App. A12.

2. Petitioners argue further (Pet. 12-16) that the Federal Circuit's opinion conflicts with this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). The argument is without merit. As petitioners acknowledge, under *Monsanto* and other applicable Supreme Court precedent, "[c]ourts still must engage in an *ad hoc*, intensely factual inquiry to decide whether government regulation triggers the Fifth Amendment." Pet. 13. In *Monsanto*, this Court stated:

> The Court * * * has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."

467 U.S. at 1005 (quoting *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 83 (1980)). The Court noted that in some cases, the last of these factors—whether there has been interference with "reasonable investment-backed expectations"—can be "so overwhelming * * * it disposes of the taking question." *Monsanto*, 467 U.S. at 1005.

Here, the only "reasonable investment-backed expectation" that petitioners could have had was that the Comptroller would not close the Bank unless he was satisfied that it was insolvent. Petitioners acknowledge that it was foreseeable that a solvent bank might be closed under the Section 191 standards. Pet. 16. But they argue that they nonetheless possessed a sufficiently "reasonable investment-backed expectation" that the Bank would not be closed if solvent to satisfy *Monsanto*'s requirements for establishing a taking.

To begin with, although there has been no judicial finding that the Bank was insolvent, the findings made by the district courts in connection with the receivership establish, at least, that the Bank was not clearly solvent when closed. As noted above, a federal district court ruled that the Comptroller correctly classified the yellow CDs as deposits. Once he had correctly classified the yellow CDs as deposits, the Comptroller reasonably concluded the bank was insolvent when the Bank failed to demonstrate that it had sufficient assets to offset the liabilities represented by those deposits. Even after the determination of insolvency, the Comptroller appointed the FDIC as receiver only when a run on the Bank exacerbated the situation. Although petitioners differ with the Comptroller's judgment, a federal district court familiar with the record has found the Comptroller's actions reasonable. These facts make clear that the Comptroller's appointment of a receiver for the Bank was no unforseeable, aberrant action, but rather a predictable response to the Bank's serious financial circumstances.

Second, the Federal Circuit's rejection of their takings claims is fully consistent with *Monsanto*. The question at issue in that case was whether amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which permitted the disclosure of previously confidential trade secrets included in data submitted to the Environmental Protection Agency (EPA), could constitute a taking of property under the Fifth Amendment. When Monsanto had submitted data to the EPA between 1972 and 1978, prior to the enactment of the FIFRA amendments, "the Federal Government had explicitly guaranteed * * * an extensive measure of confidentiality and exclusive use."

467 U.S. at 1011. This Court held that disclosure under the FIFRA amendments of trade secrets included in earlier-submitted data would constitute a compensable taking. In this case, by contrast, there was no change in the rules; the government never guaranteed that a solvent bank would not be closed.[5]

Third, even if it was probable that a solvent bank would not be closed under Section 191, the concept of "reasonable investment-backed expectations" has never been understood to refer only to the single most probable outcome. To the contrary, it has always been understood to encompass the realm of reasonably expected outcomes, a territory that clearly includes the foreseeable consequences of the enforcement of ordinary, preexisting government regulations. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979). Although the probability of a mistaken closing of a solvent bank might have been low, petitioners' concession that the occurrence was foreseeable, Pet. 16, effectively precludes their takings claim.

3. Finally, petitioners claim that this case presents a particularly egregious example of a government taking, because the government not only put the Bank into

[5] Petitioners contend (Pet. 14-15) that the 1972-1978 regulations at issue in *Monsanto* similarly had no iron-clad guarantee against wrongful disclosure. Like Section 191, which permits the Comptroller to act when he is "satisfied" of insolvency, the EPA could disclose data prior to the 1978 amendments so long as "in [the] EPA's judgment," the data contained no trade secrets. Pet. 14 (quoting *Monsanto*, 467 U.S. at 992). Petitioners' observations about the 1972-1978 regulations are accurate but irrelevant, because the Court was not presented in *Monsanto* with a claim of mistaken disclosure under those rules, but rather with a challenge to Congress's retroactive elimination of the degree of protection afforded by the prior regulations.

receivership but also claimed for itself surplus assets remaining after the depositors and creditors had been paid in full. Pet. 5. Petitioners' argument on this point goes well beyond any evidence presented to or facts found by the Claims Court or the Federal Circuit. See Gov't C.A. Br. 2-4 & nn. 2, 3. Moreover, their claim that the FDIC appropriated surplus assets is factually incorrect. Contrary to petitioners' contention, there were no surplus assets. The Bank's uninsured depositors and creditors eventually received the principal, but not the interest, owing on their claims, and even that limited repayment was made possible only as the result of the government's $14 million settlement with the Bank's former president. See *id.* at 20 n.21. Finally, the FDIC was obligated, under 12 U.S.C. 1821, to distribute to a bank's shareholders any post-receivership surplus. If the FDIC had failed to distribute surplus assets in accordance with the statute, its actions would have been unauthorized and could not form the basis for a takings claim. See Pet. App. A15-A16.

4. Wholly aside from the merits, this case does not warrant review because petitioners' Fifth Amendment claim is barred by *res judicata*. As indicated above, petitioners had asserted a Fifth Amendment claim seeking monetary and injunctive relief in a prior action in district court. Although the district court in that action did not specifically address petitioners' Fifth Amendment claim, it granted the government's summary judgment motion in full. Pet. App. A3-A4. Petitioners then failed to raise the Fifth Amendment claim in their initial brief in the court of appeals, invoking it only in their reply brief. See Pet. App. A5. For that reason, the court of appeals refused to consider the Fifth Amendment claim. Petitioners should be deemed to have

waived the Fifth Amendment claim by their failure to pursue it in the prior lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys

JULIE L. WILLIAMS
Chief Counsel

ROBERT B. SERINO
Deputy Chief Counsel

L. ROBERT GRIFFIN
ROSA KOPPEL
DAVID C. DOUGLAS
Attorneys
Office of the Comptroller of the Currency

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